Calendar No. 178

99TH CONGRESS
1st Session

SENATE

REPORT
99-80

UNITED STATES TRAVEL AND TOURISM ADMINISTRATION AUTHORIZATION

JUNE 11 (legislative day, JUNE 3), 1985.—Ordered to be printed

Mr. DANFORTH, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 374]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 374) to provide authorization of appropriations for the United States Travel and Tourism Administration, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

PURPOSE OF BILL

The bill, as reported, amends section 304 of the International Travel Act of 1961 to provide authorization of appropriations for the United States Travel and Tourism Administration (USTTA) for fiscal years 1986, 1987, and 1938 as the respective funding levels of $12 million, $13 million, and $14 million.

BACKGROUND AND NEEDS

The USTTA was created by the enactment of the National Tourism Policy Act of 1981 (Public Law 97-63). The USTTA is currently operating without an authorization, and the Committee wishes to provide a multiyear USTTA authorization to demonstrate congressional recognition of the economic importance of travel and tourism and to show clearly the intent of the Congress to provide adequate funding for the USTTA on a long-term basis.

The current USTTA budget is $12 million. The administration has proposed to eliminate the USTTA during fiscal year 1986.

The Committee notes that proposals by successive administrations to reduce or eliminate Federal tourism promotion have forced

51-010 O

S263-22.

the Congress to fight each year to provide adequate authorization and appropriation levels for the USTTA and its predecessor, the U.S. Travel Service. Uncertainty over future funding levels has inhibited the USTTA's ability to plan promotional programs. The Committee intends for the multiyear authorization provided by S. 374, to provide the stability needed for the USTTA to compete successfully with the agencies of more than 120 nations throughout the world.

During hearings on fiscal year 1986 USTTA funding, the Committee received testimony which strongly supported the authorization of sufficient funds to preserve USTTA programs. Witnesses cited the value of USTTA programs in the creation of jobs, tax revenues and international goodwill. The Committee recognizes that the value of these benefits greatly exceeds the Federal expenditures associated with USTTA promotional programs. The Committee also notes that many other nations spend vastly larger sums on international tourism promotion than the USTTA is able to spend and that the decline in the U.S. share of international tourism receipts since 1976 has corresponded with a decline in constant dollar U.S. tourism promotional expenditures.

Testimony received from the Department of Commerce confirmed that the elimination of the USTTA would effectively terminate performance by the Federal Government of the functions mandated by Public Law 97-63.

Legislative History

S. 374 was introduced on January 31, 1985 by Senator Pressler, together with 15 original cosponsors. The bill, as introduced, provided a $15 million USTTA authorization for fiscal year 1986.

On March 25, 1985, the Subcommittee on Business, Trade, and Tourism held a hearing on funding for the USTTA.

The Committee considered S. 374 at an executive session on May 9, 1985. Senator Pressler proposed to amend the bill to authorize $12 million, $12,500,000, and $13 million for the respective fiscal years 1986 through 1988. Senator Pressler agreed to an amendment by Senator Inouye which authorized respective sums of $12 million, $13 million, and $14 million for fiscal years 1986 through 1988. The bill was ordered reported, unanimously, with Senator Inouye's amendment.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 14, 1985.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 374, a bill to provide authorization of appropriations for the United States Travel and Tourism Administration.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 374.

2. Bill title: A bill to provide authorization of appropriations for the United States Travel and Tourism Administration.

3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, May 9, 1985.

4. Bill purpose: S. 374 authorizes the appropriation of $12 million in fiscal year 1986, $13 million in fiscal year 1987, and $14 million in fiscal year 1988 for the activities of the United States Travel and Tourism Administration (USTTA). Fiscal year 1985 appropriations to date for USTTA are $12 million. The President is requesting $4 million in 1986 for this purpose.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1986	1987	1988	1989	1990
Authorization level	12.0	13.0	14.0	.....	.....
Estimated outlays	8.6	11.8	13.6	3.7	1.3

Including outlays from prior years budget authority, total outlays for USTTA are estimated to be $12.0 million in 1986 and $12.8 million in 1987.

The costs of this bill fall within budget function 370.

Basis of estimate.—For purposes of this estimate, it is assumed that the amounts authorized in the bill will be appropriated prior to the beginning of each fiscal year. Outlays reflect historical spending patterns.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Mary Maginniss.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

The bill merely authorizes existing programs of the USTTA for fiscal years 1986, 1987, and 1988. The bill will not change these programs, and will have no additional impact on the number of businesses or individuals subject to Federal regulation, personal privacy, or Federal paperwork.

Section-by-Section Analysis

The bill has only one section, which authorizes $12 million, $13 million, and $14 million for the respective fiscal years 1986 through 1988.

The Committee stresses that the multyear authorization provided in the bill is intended to convey the Committee's support for the long-term continuation of the USTTA at sufficient funding levels to preserve all programs. The Committee reduced the fiscal year 1986 authorization level to $12 million in keeping with the Senate objective of limiting fiscal year 1986 Federal spending to the fiscal year 1985 level.

The Committee also emphasizes that the funding authorized by S. 374 is intended to support USTTA promotional activities through the existing USTTA overseas field offices and through offices in Australia, Italy, and the Netherlands. The Committee expects the Administration to proceed with the establishment of the three new overseas field offices, as mandated by Public Law 98–411. The Committee further expects these offices to be established in accordance with the requirements of Public Law 97–63, which prohibits any reductions in budget, personnel, or programs at the overseas field offices.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

The International Travel Act of 1961

SECTION 304 OF THAT ACT

SEC. 304. For the purpose of carrying out this Act there is authorized to be appropriated an amount not to exceed $8,600,000 for the fiscal year ending September 30, 1982, *not to exceed $12 million for the fiscal year ending September 30, 1986, not to exceed $13 million for the fiscal year ending September 30, 1987, and not to exceed $14 million for the fiscal year ending September 30, 1988.* Funds appropriated under this section shall be available without regard to

the provisions of section 501 and 3702 of title 44 of the United States Code. Funds appropriated under this section for printing of travel promotion materials are authorized to be made available for two fiscal years.

○

Calendar No. 179

99TH CONGRESS
1st Session

SENATE

REPORT
99-81

FEDERAL TRADE COMMISSION ACT AMENDMENTS OF 1985

JUNE 11 (legislative day, JUNE 3), 1985.—Ordered to be printed

Mr. DANFORTH, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1078]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1078) to amend the Federal Trade Commission Act to provide authorization of appropriations, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to amend the Federal Trade Commission Act (15 U.S.C. 41 et seq.) to change the investigative, adjudicative, and rulemaking authority of the Federal Trade Commission (FTC), and to extend authorization of appropriations for the agency. This legislation would authorize to be appropriated $65,800,000 for fiscal year 1986, $66,800,000 for fiscal year 1987, and $67,800,000 for fiscal year 1988.

BACKGROUND AND NEEDS

Under the FTC Act, the Commission seeks to prevent anticompetitive conduct through its authority over "unfair methods of competition," and protect consumers through its "unfair or deceptive acts or practices" authority. The Commission may enforce this mandate through case-by-case adjudications under section 5 of the FTC Act (15 U.S.C. 45) and through industry-wide rulemaking.

51-010

S263-23

In the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 (Public Law 93-637), Congress added a new section 18 to the FTC Act (15 U.S.C. 57a), providing the agency explicit authority and detailed new procedures for promulgating trade rules to prohibit "unfair or deceptive" practices. Largely as a result of dissatisfaction with the Commission's exercise of its section 18 consumer protection rulemaking authority, Congress redirected some of the agency's rulemaking and added additional rulemaking procedures in the FTC Improvements Act of 1980 (Public Law 96-252).

The FTC Improvements Act expired at the end of fiscal year 1982, and the Commission has been without an authorization of appropriations since that time. During the 97th and 98th Congresses, the Committee monitored the Commission's compliance with the Improvements Act and, in connection with the agency's reauthorization, undertook a broader review of the Commission's exercise of its statutory mandate. This process resulted in the development of two authorization bills (S. 2499 and S. 1714) that were reported by the Committee in the 97th and 98th Congresses, respectively, but were not acted upon by the Senate prior to final adjournment.

The Committee's review of the Commission's activities has continued in the development of S. 1078, the Federal Trade Commission Act Amendments of 1985. This measure extends the authorization for the Commission and makes changes in Commission authority and procedures that were adopted by the Committee in the authorization legislation reported in the 97th and 98th Congresses.

UNFAIRNESS STANDARD

In particular, evaluation and study of the Commission's authority to prohibit "unfair . . . acts or practices" has continued since 1980. Enacted as part of the Wheeler-Lea Amendment in 1938, the Commission's consumer "unfairness" authority was not a focus of enfocement action until 1964 when, as part of its Statement of Basis and Purpose for a proposed cigarette health warning rule, the Commission identified three factors to be considered in applying the prohibition agianst consumer unfairness: (1) Whether the practice injures consumers; (2) whether it violates esablished public policy; and (3) whether it is unethical or unscrupulous.[1] These three factors were later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchinson.*[2]

In response to concerns that the Commission's unfairness authority was poorly defined by these principles and potentially unbounded, the Consumer Subcommittee requested public comment on the scope of the Commission's unfairness authority,[3] and wrote to the Commission to request more specific views.

In its December 17, 1980 letter in response, the Commission abandoned one portion of its 1964 unfairness criteria and, summa-

---

[1] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

[2] *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 223, 244-45 n. 5 (1972).

[3] The public comments received have been printed by the Committee. See Senate Committee on Commerce, Science, and Transportation, 96th Cong., 2d Sess., Unfairness: Views on Unfair Acts and Practices in violation of the Federal Trade Commission Act (Comm. Print 1980).

rizing its past use of unfairness in decided cases and rules, articulated guiding principles for future application of its unfairness mandate. Under the Commission's policy statement, unjustified consumer injury is the primary focus of the FTC Act, and the most important of the 1964 criteria. Not every consumer injury is legally "unfair," however; to justify a finding of unfairness, the injury must satisfy three tests:

> It must be substantial; it must not be outweighted by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[4]

With regard to the second of the 1964 criteria, the Commission observed that while "established public policy" may sometimes independently support Commission action, it is used most frequently by the Commission as a means of providing additional evidence of consumer injury. Such a policy must be "clear and well-established" and:

> Declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from a general sense of rational values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court.[5]

The Commission explicitly abandoned future use of the third part of the 1964 criteria relating to "unethical and unscrupulous" conduct.

On March 5, 1982, the Commission wrote again to the Committee,[6] reaffirming the principles of its December 17, 1980 policy statement and recommending that they be codified as a statutory definition of unfairness. Section 9 of S. 1078 contains such a new definition of unfairness.

COMMERCIAL ADVERTISING

In addition to problems with the scope of the Commission's unfairness authority, the Committee has been concerned with the use of unfairness to regulate commercial advertising. Traditionally, both before and after the Wheeler-Lea Amendment of 1938, the Commission has regulated commercial advertising only to prevent deception. In its staff report on "Television Advertising to Children" (February 1978) however, the Commission contemplated regulation of some children's advertising, not because it deceived children, but because it was "unfair."

Concerned with the potentially unbounded regulation of nondeceptive commercial advertising on the basis of unfairness, Congress addressed this issue in two ways in section 11 of the FTC Improvements Act of 1980. First, the Commission's authority to issue a children's advertising rule based on unfairness was removed. (After

---

[4] December 17, 1980 letter from FTC to Senators Ford and Danforth at page 5. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97-108).

[5] December 17, 1980 letter from FTC to Senators Ford and Danforth, *supra* note 4, at page 12.

[6] March 5, 1982 letter from FTC to Senators Packwood and Kasten. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97-108).

conducting an evaluation of the basis for a children's advertising rule on a deception theory, the Commission terminated the children's advertising proceeding in 1981.)

Second, Congress placed a moratorium on the Commission's use of unfairness in new section 18 rulemakings designed to regulate commercial advertising. The moratorium on new rulemakings permitted the Commission to continue to regulate commercial advertising on the basis of deception, and the Commission retained the authority to rely on unfairness in individual cases against advertisers under section 5 of the FTC Act. Because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a Constitutional conflict with first amendment protections for free speech. Section 12 of S. 1078, which makes permanent this moratorium on new section 18 rulemakings to regulate advertising based on unfairness, is motivated by the Committee's continued concern with the potential for abuse in this area.[7]

ACTIVITIES CONCERNING PROFESSIONALS

Since the mid-1970's, the Commission has been active in initiating studies, investigations, cases, and rules respecting State-licensed professionals, including doctors, dentists, optometrists, and veterinarians. Much of this Commission activity has focused on traditional antitrust enforcement, such as the Commission's adjudication against the American Medical Association (AMA) and the American Dental Association for alleged restraints on advertising by their members.[8]

The Commission also has proceeded under its consumer protection authority, however, principally through rulemakings under section 18 of the FTC Act. In 1978, the Commission issued its trade regulations rule on Advertising of Ophthalmic Goods and Services ("Eyeglasses I" Rule) (16 C.F.R. Part 456). As promulgated, the Eyeglasses I rule would have effectively negated State local laws and regulations which banned truthful advertising by ophthalmologists, optometrists and opticians, and also would have required eye doctors to give each patient a copy of his or her eyeglass prescription following an eye exam so that the patient may comparsion shop for eyewear.

In 1980 the court of appeals upheld the rule's prescription release requirement, but remanded the remainder of the rule for further consideration.[9]

On December 2, 1980, the Commission issued an advance notice of proposed rulemaking in another rulemaking relating to commer-

---

[7] This restriction on section 18 rulemaking authority does not impede the Commission's ability to address new legal questions pertaining to commercial advertising in individual cases under section 5. As discussed in the section-by-section analysis under section 6 the U.S. Court of Appeals for the Ninth Circuit was incorrect to suggest that the Commission cannot use its adjudicative authority to address novel legal questions.

[8] *See American Medical Association*, 94 FTC 701 (1978) and, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court without opinion*, 455 U.S. 676 (1982). The Second Circuit's opinion in this case also settled the issue of the Commission's jurisdiction over private non-profit professional associations, where "the association engages in a substantial amount of activity for the pecuniary gain of its members." 638 F.2d at 454 (Mansfield, J., concurring in part and dissenting in part).

[9] *American Optometric Association* v. *FTC*, 626 F.2d 896 (D.C. Cir 1980).

cial ophthalmic practice ("Eyeglasses II" Rule). Following its investigation, the staff of the Commission recommended a rule superseding State law restricting certain forms of commercial practice.

After evaluating the comments received on this staff proposal and other regulatory options, the Commission has continued this rulemaking proceeding. On January 4, 1985, the Commission issued a notice of proposed rulemaking relating to this trade regulation rule that would remove four major restraints imposed by State law on commercial forms of ophthalmic practice: (1) Restrictions on employer-employee or other business relationships between optometrists or opticians and nonprofessional corporations or unlicensed persons; (2) limitations on the number of branch offices an optometrist or optician may operate; (3) restrictions on the practice of optometry on the premises of merchantile establishments (such as department stores); and (4) bans on the practice of optometry under a trade name.[10] The comment period on this proposed rule ended on April 5, 1985, and public hearings are scheduled to begin in May 1985.

The Commission also has investigated similar commercial practice restrictions in the delivery of dental and legal services. In November, 1984, the Commission authorized publication of a staff report analyzing the economic impact of such restrictions on lawyers. A report to the Commission on the impact of commercial practice restraints on dentistry is nearing completion. The Commission had conducted economic studies of the impact on consumers of restrictions on advertising and other commercial practice, issued advisory opinions and enforcement guides in the antitrust area, studied restrictions on the scope of practice of contact lens fitters and dental hygienists and issued a report with respect to such restraints on contact lens fitters, and developed model State statutes and regulations intended to assist the States develop more competition-oriented forms of economic regulation for providers of professional services.

Believing that the Commission was intruding inappropriately on State prerogatives and professional self-regulation, the American Medical Association (AMA) and other groups have testified before the Committee in support of controversial legislation to exempt State-regulated professionals entirely from the Commission's jurisdiction.[11] Such an exemption proposal was offered in the Senate on December 17, 1982, as an amendment to legislation to provide appropriation of funds for the Commission. This amendment was defeated by a vote of 59–37.[12] Subsequently, the AMA and the Chairman of the Commission met over a period of time to develop proposed compromise legislation limiting the Commission's authority to invalidate State law. This compromise legislation was contained in section 2(b) of S. 1714, the Commission authorization bill reported by the Committee in the 98th Congress.

---

[10] 50 Fed. Reg. 598 (1985).

[11] *See generally.* Hearings before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation on FTC Activities Concerning Professionals, 97th Cong., 1st Sess. (July 15 and 17, 1981) (Serial No. 97–59).

[12] See debate concerning H.J. Res. 599 in the Congressional Record of December 16, 1982, pages S16069–80. The proposed professionals exemption was defeated in the Senate on an earlier occasion, as well. See Congressional Record of February 6, 1980, pages S1102–7.

This compromise legislation prohibited the Commission from using its consumer protection authority to invalidate State laws prescribing training, education, or experience requirements for licensure, or the permissible tasks or duties that professionals may perform based on specialized training or education. Controversy as to the need for this language and its impact on Commission authority was an obstacle to floor action on S. 1714 during the 98th Congress.

S. 1078, as reported, does not contain this "professionals" legislation, which was reevaluated at the FTC authorization hearing held before the Consumer Subcommittee on April 24, 1985. In hearing testimony and statements to the subcommittee, the continued need for the "professionals" compromise was questioned by the AMA and other groups.

The AMA, which had helped to formulate the compromise, noted "an increasingly sophisticated recognition by the FTC of the many benefits that appropriate self-regulation provides the public," and that recent Supreme Court decisions have "clarified the antitrust consequences of private actions authorized by the states."[13] The AMA concluded:

> . . . [I]t is no longer necessary to adopt specific language concerning the professions as part of FTC reauthorization legislation. On the contrary, we feel that in today's climate such language could be counterproductive as establishing rigid limits in a period of mutual discussions and evolving law.[14]

Legislative History

S. 1078 was introduced by Senator Kasten, with Senators Danforth, Packwood, and Gorton as cosponsors, on May 6, 1985, following a hearing on April 24, 1985. On May 9, 1985, the Committee without objection ordered S. 1078 to be reported, with an amendment.

In the 98th Congress, Senator Packwood introduced S. 1714, the predecessor to the present authorization bill, on July 29, 1983. General hearings on the reauthorization of the FTC were conducted before the Committee on March 16, 17, and 18, 1983 (Serial No. 98-19) and March 18 and 19, 1982 (Serial No. 97-108). S. 1714 was ordered reported by the Committee on August 2, 1983 (S. Rept. 98-364). The 98th Congress adjourned, however, without Senate action on S. 1714.

In the 97th Congress, more focused hearings were conducted before the Consumer Subcommittee on July 15 and 17, 1981, regarding the FTC's jurisdiction over State-regulated professional activities (Serial No. 97-59) and on July 22, 1982, regarding the FTC's authority to ban deceptive advertising (Serial No. 97-134).

Related legislation referred to the Committee during the 97th Congress included S. 1984 (introduced by Senator McClure); S. 2221 (Senator Cannon); and S. 2499 (Senator Kasten). S. 2499 was reported by the Committee on May 28, 1982 (S. Rept. No. 97-451); howev-

---

[13] Statement of AMA, presented by Joseph M. Boyle, M.D., President, April 24, 1985, at 3-4.
[14] *Id.* at 4.

er, the 97th Congress adjourned without Senate action on this measure.

Summary of Major Provisions

SECTION 2.—UNFAIR METHODS OF COMPETITION

This section contains a new statutory limitation on the Commission's authority with respect to certain regulatory functions of the States. It adds a new subsection to section 5 of the FTC Act, which provides that the "State action" antitrust immunity developed by the courts in litigation under the Sherman Act would be applied also to the Commission's "unfair methods of competition" cases.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 24 to the FTC Act to make permanent temporary prohibitions of Commission studies, investigations or prosecutions of agricultural cooperatives for conduct falling within the limited antitrust immunity provided by the Capper-Volstead Act. In addition, the Commission would be required to consult with the Secretary of Agriculture regarding the applicability of the Capper-Volstead immunity before suing a cooperative for an antitrust violation.

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal the Commission's authority under section 18(h) of the FTC Act to compensate public participants in Commission rulemaking proceedings.

SECTION 5.—KNOWING VIOLATIONS OF ORDERS

This section would amend section 5(m)(1)(B) of the FTC Act (which gives the Commission the authority to go to Federal court to seek civil penalties against one company for a knowing violation of the holding of a prior case against a different company) to permit the defendant to challenge in court the legal basis for the Commission's prior order, thereby codifying the U.S. District Court decision in *United States* v. *Braswell, Inc.,* 1981-82 Trade Cas. (CCH) ¶ 64,325 (N.D. Ga. 1981), *aff'd,* No. 81-9666 (11th Cir., March 3, 1982).

SECTION 6.—PREVALENCE

This section would amend section 18(b) of the FTC Act to provide that the Commission may issue a notice of proposed rulemaking only where it has reason to believe that the challenged conduct is prevalent in the industry.

SECTION 7.—EFFECTIVE DATE OF ORDERS

This section would amend section 5(g) of the FTC Act to end the present requirement for an automatic stay of Commission cease-and-desist orders pending appeal, and, with some exceptions, provide instead that Commission orders may be stayed by the Commission itself or by the courts (within their discretion) during the

appeal process. This section would conform Commission practice to that of other Federal agencies.

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would extend the "civil investigative demand" document procedures contained in section 20 of the FTC Act, which now apply to Commission investigations under its consumer protection authority, to antitrust investigations conducted by the Commission. Principally, this amendment would have the effect of requiring that Commission antitrust investigations be conducted pursuant to section 20, just as consumer protection investigations already are.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would add a new subsection to section 5 of the FTC Act limiting unlawful "unfair acts or practices" to acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This definition would circumscribe the Commission's consumer unfairness authority for both rulemaking and case-by-case adjudications.

SECTION 10.—TRADEMARKS

This section would add a new section 25 to the FTC Act making permanent the temporary prohibition of certain Commission actions to cancel the registration of trademarks.

SECTION 11.—CREDIT UNIONS

This section would amend sections 5, 6, and 18 of the FTC Act to exempt Federal credit unions from commission jurisdiction on the same basis that banks and savings and loan institutions are now exempt. Federal credit unions are regulated by the National Credit Union Administration.

SECTION 12.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to make permanent the temporary provision prohibiting the Commission from initiating any new rulemaking proceeding prohibiting or otherwise regulating any commercial advertising on the basis that such advertising is an unfair act or practice.

SECTION 13.—REPORT

This section would require the Commission to report semiannually to the Senate Commerce Committee and the House Energy and Commerce Committee on FTC enforcement activities in the area of resale price maintenance.

SECTION 14.—AUTHORIZATION OF APPROPRIATIONS

This section would reauthorize the Commission for 3 years at the following funding levels: $65,800,000 for fiscal year 1986; $66,800,000 for fiscal year 1987; and $67,800,000 for fiscal year 1988.

For fiscal years 1987 and 1988, such additional amounts are also authorized as may be necessary for increases in salary, pay, and other employee benefits authorized by law.

SECTION 15.—BUILDING CONSOLIDATION

This section authorizes a total appropriation of $3,811,000, during fiscal years 1986, 1987, and 1988, to carry out the consolidation into not more than three buildings of the Headquarters Offices of the Commission in Washington, D.C.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 14, 1985.

Hon. JOHN C. DANFORTH,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 1078, the Federal Trade Commission Act Amendments of 1985.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 1078.
2. Bill title: Federal Trade Commission Act Amendments of 1985.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science and Transportation, May 9, 1985.
4. Bill purpose: S. 1078 authorizes the appropriation of up to $65.8 million in fiscal year 1986, $66.8 million in fiscal year 1987, and $67.8 million in fiscal year 1988 to carry out the programs of the Federal Trade Commission (FTC), plus such sums as may be necessary in 1987 and 1988 for increases in salary, pay, and other employee benefits as authorized by law. It also authorizes an appropriation of $3.8 million to consolidate the building headquarters of the FTC. In addition, the bill makes a number of changes in FTC policies and procedures, including the elimination of public rulemaking grants.

Fiscal year 1985 appropriations to date for the FTC are $64.3 million. The President is requeting $63.9 million for the FTC in 1986. The President has also requested a 1985 supplemental for $3.8 million.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1986	1987	1988	1989	1990
Authorization level:					
Specified (function 370)	69.6	66.8	67.8		
Estimated (function 920)		1.8	2.4		
Total	69.6	68.6	70.2		
Estimated outlays	62.1	70.2	70.0	6.1	

Including outlays from prior years' budget authority, total outlays for the FTC in 1986 would be approximately $65.7 million.

The costs of this bill fall within budget function 370.

Basis of Estimate: For purposes of this estimate, it was assumed that the amount authorized in the bill would be appropriated prior to the beginning of each fiscal year, including the $3.8 million for headquarters consolidation. The estimated increases for pay, benefits and other increases required by law in 1987 and 1988 are estimated consistent with CBO baseline projections for the Senate Budget Committee. Outlays reflect historical spending patterns for the ongoing activities of the FTC. Outlays for the building consolidation are estimated to occur at a rate of 50 percent in 1986 and 50 percent in 1987.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Mary Maginniss.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

This legislation is expected to reduce the burdens of FTC regulation, principally by limiting the Commission's jurisdiction over certain classes of persons, activities, and entities, and by circumscribing certain types of authority. Sections 2 and 3 limit the Commission's "unfair methods of competition" authority over State-regulated activities and agricultural cooperatives. Section 11 of the bill would exclude credit unions from Commission jurisdiction to the same extent that banks and savings and loan institutions are exempt. Any adverse economic impact of Commission regulation is likely to be reduced by clarifications of Commission authority contained in other sections, including sections 6, 9, 10, and 12. This legislation provides authority for a $3,800,000 consolidation of the headquarters offices of the Commission in Washington, DC, but it contains no other major obligations or new authority for the Commission. This legislation is not likely to affect substantially the privacy of individuals or paperwork requirements.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section contains the short title of the legislation, the "Federal Trade Commission Act Amendments of 1985".

SECTION 2.—UNFAIR METHODS OF COMPETITION

This section contains a new statutory limitation on the Commission's "unfair methods of competition" authority. It would amend section 5 of the FTC Act to add a new subsection providing that the Commission shall not have any authority to find a method of competition to be an unfair method of competition if, in any action under the Sherman Act,[15] such method of competition would be held to constitute "State action".

Beginning with the Supreme Court's 1943 decision in *Parker* v. *Brown*,[16] courts have held anticompetitive conduct to be exempt from antitrust challenge under the Sherman Act if, first, the conduct was undertaken pursuant to clearly articulated and affirmatively expressed State policy to displace competition and second, this conduct was actively supervised by the State.[17] The purpose of this section is to eliminate any uncertainty as to the applicability of the judicially-developed "State action" immunity to the Commission's "unfair methods of competition" authority, just as this immunity is applicable presently to actions under the Sherman Act.

In the past, the Commission has recognized that adjudications pursuant to its "unfair methods of competition" authority are subject to the "State action" doctrine, which rests on principles of federalism and State sovereignty.[18] The Committee intends that as courts continue to refine and develop the "State action" immunity, these refinements and changes will apply to such future Commission adjudications, as well.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 24 to the FTC Act, making permanent section 20 of the FTC Improvements Act of 1980, which prohibited the Commission temporarily from any study or investigation of agricultural marketing orders, or any study, investigation or prosecution of agricultural cooperatives for conduct which the Capper-Volstead Act exempts from the antitrust laws.

---

[15] 15 U.S.C. 1-7.

[16] 317 U.S. 341 (1943).

[17] *See, e.g., Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978); *California Retail Liquor Dealers Ass'n.* v. *Medical Aluminum, Inc.*, 445 U.S. 97 (1980); *Town of Hallie* v. *City of Eau Claire*, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference* v. *United States*, 105 S. Ct. 1721 (1985). (In *Southern Motor Carriers*, the Supreme Court recently held that the collective ratemaking activities of motor common carriers in certain States, although not compelled by the States, were immune from Federal antitrust liability, because the anticompetitive conduct was authorized pursuant to clearly articulated State policies and was the subject of active supervision by the States.)

[18] *See, e.g., Massachusetts Furniture and Piano Movers*, 102 F.T.C. 1176 (1983), *appeal filed sub. nom. Massachusetts Furniture and Piano Movers* v. *FTC*, No. 83-1892 (1st Cir. filed Dec. 6, 1983).

In addition, this section would create a new procedure permitting the Commission to issue antitrust complaint against agricultural cooperatives only if—

(1) the Commission gives 15-days' notice to and consult with the Secretary of Agriculture on the applicability of the Capper-Volstead Act to the conduct to be challenged;

(2) the Commission considers any comments actually submitted by the Secretary of Agriculture; and

(3) the Commission has reason to believe that the conduct in question is not exempt under the Capper-Volstead Act.

Furthermore, this procedure would give the Secretary of Agriculture, after the issuance of a Commission antitrust complaint against an agricultural cooperative, an opportunity to submit a written statement on the applicability of the Capper-Volstead Act, which must be included in the record of the proceedings.

The Committee intends that this procedure give the Secretary of Agriculture an advisory role. The Secretary would not have authority to veto or unilaterally to delay Commission law enforcement decisions involving agricultural cooperatives, nor would the Secretary's role be deemed to be formal intervention. Officials and employees of the Department of Agriculture would be subject to the same requirements and penalties regarding confidentiality of documents and information provided by the Commission and disclosure of the existence of an investigation or consideration of the issuance of a complaint as apply of officials and employees of the Commission.

The procedure is intended to give the Secretary of Agriculture an opportunity to present views and comments on the applicability of the Capper-Volstead Act. There is no requirements that the Secretary actually comment in any particular instance. If the Secretary does not comment within the 15-day period, the Commission would be able to issue the complaint, provided all other statutory requirements were met. Even if the Secretary of Agriculture concluded and advised the Commission that particular conduct is exempt, the Commission would still have the authority to issue an antitrust complaint against an agricultural cooperative.

While requiring an initial notification of the Secretary of Agriculture at least 15 days prior to the Commission's issuing an antitrust complaint against a Capper-Volstead agricultural cooperative, this section would not require a resubmission and retriggering of the 15-day period if the Commission made relatively minor changes or dropped some proposed allegations. However, resubmission would be required in the event the Commission expanded the allegations substantially.

The requirement concerning consultation is intended to require that the Commission or designated staff offer to meet with the Secretary of Agriculture or designated staff to discuss facts and allegations so as to enable the Secretary to provide comments in a timely manner on the applicability of the Capper-Volstead Act. This consultation requirement is not intended to be overly rigid or formal, however.

This section makes clear that Commission decisions made in accordance with the newly established procedure would not be deemed to constitute prejudgment by the FTC. In addition, the

Committee emphasizes its intention that the procedure not create any new basis for direct or collateral challenge to Commission actions.[19]

The Committee believes this new procedure would not conflict with the Commission's responsibilities under the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, nor would it significantly delay other appropriate Commission law enforcement activity regarding agricultural cooperatives.

Subsection (c) of the new section 24 would apply only to antitrust complaints issued against Capper-Volstead agricultural cooperatives after the date of enactment; and it would not apply to nonantitrust compliants or to antitrust complaints issued before the date of enactment.

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal section 18(h) of the FTC Act, the Commission's authority to provide compensation for reasonable attorneys fees, expert witness fees, and other costs to participant in section 18 trade regulation rulemakings. No funds have been appropriated for this program since fiscal year 1980.

SECTION 5.—KNOWING VIOLATIONS OF CEASE-AND-DESIST ORDERS

The purpose of this section is to clarify the scope of the Commission's existing authority under section 5(m)(1)(B) of the FTC Act to obtain civil penalties against persons who violate the holdings of prior cases. Section 5(m)(1)(B) provides that the Commission may obtain a civil penalty against a person who violates the holding of a prior case—even though that person was not a party—if the Commission can prove that the violator had actual knowledge that the practice was unfair or deceptive and unlawful.

Subsection (a) of this section would amend section 5(m)(1)(B) to make clear that such nonrespondent liability may not be imposed where such person has violated the standards of an outstanding consent agreement. The committee intends that a case settled by consent agreement would not qualify as a predicate for a section 5(m)(1)(B) proceeding, because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding. By contrast, the Commission issues a final cease-and-desist order only after all factual and legal issues have been fully adjudicated before an administrative law judge, subject to review by the Commission. Thus, it is the Commission's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements, and this subsection codified this practice.

Subsection (b) would amend section 5(m)(1)(B) to make clear that where the Commission seeks a civil penalty based on a violation of a holding in a case to which the defendant was not a party, the defendant may challenge in the penalty suit the validty of the Commission's legal determination of what constitutes an unfair or

[19] *See FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980); *Dairymen, Inc.* v. *FTC, 684 F. 2d 376 (6th Cir. 1982), cert. denied,* 459 U.S. 976 (1982).

deceptive practice under section 5(a)(1). The court would examine the Commission's interpretation under the appropriate standard of view.[20] The Commission has already conceded in litigation under section 5(m)(1)(B), and one court has so held, that defendants in section 5(m)(1)(B) cases must be given this right.[21] Because subsection (b) is intended to codify the Commission's current policy, as developed in the *Braswell* litigation, the Committee intends that subsection (b) apply to cases currently in litigation as well as cases intitiated under section 5(m)(1)(B) following enactment of this legislation.

SECTION 6.—PREVALENCE OF UNLAWFUL ACTS AND PRACTICES

This section would amend section 18(b) of the FTC Act to reemphasize the importance of prevalence as a basis for initiating a trade regulation rulemaking. Although the Commission has generally exercised appropriate discretion in initiating rulemaking proceedings, the Committee believes a statutory standard to guide the exercise of this discretion is desirable.

The section provides that the Commission may issue a notice of proposed rulemaking only if it has "reason to believe" that unfair or deceptive acts or practices are "prevalent." Prevalence exists only if the Commission has issued cease and desist orders regarding act and practices that are addressed by the rule, or if other information available to the Commission indicates a "pattern" of unlawful conduct. The "reason to believe" standard is intended to bar any judicial review.

The Commission should not initiate a trade regulation rulemaking where only isolated and insignificant violations have occurred. Rulemaking is permissible only where there have been several cease-and-desist-orders or other evidence of a pattern of unlawful conduct. The Commission may, of course, consider the extent to which unlawful conduct causes significant economic injury in deciding whether to commence a rulemaking proceeding. It is the combined impact of the injury and the violations found which should be considered.

Where unlawful acts or practices are not "prevalent" within the meaning of this section, the Commissions may proceed using its section 5 adjudicative authority, even if the Commission is thereby creating new law. The U.S. Court of Appeals for the Ninth Circuit was plainly incorrect to suggest recently that the Commission "exceed(s) its authority by proceeding to create new law by adjudication rather than rulemaking" and acts improperly by rendering a novel interpretation of law in an adjudication where the "rule of the case . . . will have general application." [22] Because this suggestion is inconsistent with congressional intent in conferring adjudicative authority upon the Commission, the Committee does not believe it poses any barrier to the Commission's use of adjudication to

---

[20] *See, e.g. FTC* v. *Colgate-Palmolive Co., U.S. 374 (1965).*

[21] *United States* v. *Braswell, Inc.*, 1981-82 Trade Cas (CCH) 64,325 (N.D. Ga. 1981), *aff'd*, No. 81-9666 (11th Cir., March 3, 1982).

[22] *Ford Motor Co.* v. *FTC*, 673 F.2d 1008 at 1011 (9th Cir.), *cert. denied sub nom. FTC* v. *Francis Ford, Inc.*, 459 U.S. 999 (1982). See generally K. Davis, *Administrative Law Treatise*, 1982 Supplement, section 7.25 at 182-83 and cases cited.

address novel legal question nor any barrier to effective application of this section.

SECTION 7.—EFFECTIVE DATE OF CEASE-AND-DESIST ORDERS

This section would amend section 5(g) of the FTC Act to make most Commission cease-and-desist orders effective 60 days after service unless stayed by the Commission or a court.

Currently, Commission cease-and-desist orders become final within 60 days only if no petition for review has been filed. Otherwise, the effective date of the entire order must await the decision of the Court of Appeals or the Supreme Court as the case may be. Under present law, unless the Court of Appeals grants extraordinary ancillary relief, a respondent may continue to engage in conduct which the Commission has determined unlawful until ultimate disposition of a petition for review, which often takes years.[23] Thus, in some cases, respondents are encouraged to file petitions for review, based on frivolous or other unmeritorious claims, largely for the purpose or effect of delay. This section would reduce the incentive to file petitions for review simply for dilatory purposes.

Moreover, as many challenges to Commission decisions relate only to certain provisions of a cease-and-desist order, there is no compelling reason to delay the effective date of the order in its entirety in each case, as at present.

The Committee believes that the proposed amendment offers sufficient protection to those parties with legitimate reasons for noncompliance by permitting them to obtain a stay of the order from the Commission in the first instance, the U.S. Court of Appeals before which a petition to review is pending, or the Supreme Court if a petition for certiorari has been filed. To insure against delay in action upon applications for a stay, this section would permit the Court of Appeals to consider a stay request if the Commission had not acted within 30 days of the receipt of such an application.

The procedure contemplated by this section is the norm for other federal agencies and also reflects the practice in the federal court system. Similar provisions are found in the statutes of the Civil Aeronautics Board, the Environmental Protection Agency, the Federal Communications Commission, and the Federal Energy Administration to name a few.[24]

Because of the substantial impact on business operations of a divestiture order, this section would retain the current mandatory stay requirements as to such orders. This section also retains the current definition of finality with respect to the initiation of consumer redress actions and actions arising from knowing violations of the holding of Commission decisions by nonparties.

---

[23] Chairman Miller testified that: "Of all cases finally decided by a court of appeals during the four-year period from January 1, 1977, over two-thirds of the Commission's orders were substantially affirmed. Yet the delay in the effectiveness of these affirmed orders ranged from 18 to 48 months and averaged approximately 29 months." Prepared Statement of James C. Miller III, March 18, 1982, at 6.

[24] *See e.g.*, 49 U.S.C. § 1485(a) (CAB); 7 U.S.C. § 135b(d), 42 U.S.C. § 4915(c) (EPA); 47 U.S.C. § 402 (FCC); 29 U.S.C. § 160(g) (NLRB) and 15 U.S.C. § 77i(b) (SEC).

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would amend section 20 of the FTC Act to require that all Commission law enforcement investigations be conducted pursuant to civil investigative demand ("CID") procedures set out in that section. Under current law, the CID procedures are limited to the Commission's consumer protection investigations. Because these procedures have worked well at the Commission, and because the Department of Justice has successfully used CID's in its antitrust investigations, the Committee believes that the CID procedures should apply to the Commission's antitrust investigations as well. The Committee intends no change in the scope or usage of CID's as discussed in the report of the provision enacted as section 20.[25] The Committee does not intend this legislation to apply to subpoenas outstanding at the time this legislation becomes effective or to investigative resolutions issued before the effective date.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would amend section 5 of the FTC Act to add a new subsection limiting the Commission's authority over "unfair acts or practices" to acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This limitation would apply both to adjudications under section 5 and rulemakings under section 18.

In accordance with the Commission's recommendation, this section is intended to codify, as a statutory limitation on unfair acts or practices, the principles of the Commission's December 17, 1980 policy statement on unfairness. Since the Commission's policy statement itself is based on the Commission's decided cases and rules, this section codifies existing law. The incorporation of these criteria should enable the Commission to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority, and consistently with the approach the Commission and the courts have taken in the past. The Committee believes this codification is necessary in order to provide the Commission, its staff, regulated business, and reviewing courts greater guidance on the meaning of unfairness and to prevent a future Commission from abandoning the principles of the December 17, 1980 letter.

Consumer injury may be "substantial" under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the Commission's December 17, 1980 letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair.

---

[25] *See* S. Rept. 96-500, 96th Cong., 1st Sess. pp 23-26 (1979). The Commission would continue to use subpena authority under section 9 of the FTC Act in adjudicatory proceedings and in investigations to determine whether an outstanding order to cease and desist has been violated.

In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the Commission quantify the detrimental and beneficial effects of the practice in every case. In many instances such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the Commission carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.

The Committee knows that State Attorneys General have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law.

Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while at least 30 States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts including unconscionable pricing practices, high pressure sales tactics, unhabitable living conditions in leased premises, and abusive debt collection practices.

The Committee intends no effect whatever on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the Commission's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the Commission's future construction of these criteria delimits in any way the range of State decisionmaking. Sound principles of federalism limit the impact of this section to the Commission only.

SECTION 10.—TRADEMARKS

This section would prohibit the Commission from taking any action under section 14 of the Lanham Act (15 U.S.C. 1064) with respect to the cancellation of the registration of any trademark on the ground that such mark has become the common descriptive name of an article or substance. This section would make permanent the limitation on Commission trademark litigation contained in section 18 of the FTC Improvements Act of 1980. This section does not affect any authority that the Commission may have under other statutes to bring an action challenging the validity of a trademark nor its authority under the Lanham Act to seek to have a mark cancelled on grounds other than the ground it has become "the common descriptive name of an article or substance".

SECTION 11.—CREDIT UNIONS

This section would amend portions of sections 5, 6, and 18 of the FTC Act to exempt Federal credit unions from Commission juris-

diction in the same manner that banks and savings and loan institutions are presently exempted.

When the Commission was created in 1914, banks were specifically exempted from the regulatory and investigative authorities of the newly created Commission, because, as depository institutions, they were subject to close Federal regulatory control by the Federal Reserve Board. Savings and loan institutions under the authority of the Federal Home Loan Bank Board were granted a parallel exemption in 1979, by enactment of Public Law 96-37.

Federal credit unions are extensively regulated pursuant to the Federal Credit Union Act (12 U.S.C. 1751-1795) by the National Credit Union Administration (NCUA), an independent Federal agency with primary responsibility for the chartering, supervision, regulation, and examination of credit unions chartered by the Federal Government. The regulatory presence with respect to Federal credit unions clearly parallels the presence with respect to banks and savings and loan institutions, and the Committee believes that there is no reason to treat Federal credit unions differently.

Although the Commission has never brought an enforcement action against a credit union for violations of the FTC Act, it does have two rules that would directly affect credit union lending practices. Thus, this section would end the potential for the unnecessary, costly and duplicative Government regulation that follows from having both the Commission and the NCUA regulate Federal credit unions by providing the same exemption from Commission jurisdiction now provided to banks and savings and loan institutions.

Under the terms of the exemptions provided to banks and savings and loan institutions, these institutions are excluded from the Commission's enforcement and investigative authority under sections 5 and 6 of the FTC Act, but section 18(f) provides that whenever the Commission promulgates a trade regulation rule under section 18, the Federal Reserve Board and the Federal Home Loan Bank Board must promulgate a substantially similar rule respecting banks and savings and loans unless these agencies determine that the challenged acts or practices are not unfair or deceptive in the context of those institutions.

Under section 18(f)(1), such rule must be promulgated within 60 days after the Commission's rule takes effect. This section also gives the Federal Reserve Board, the Federal Home Bank Board and now the NCUA the power to issue additional regulations defining with specificity other unfair or deceptive acts or practices and containing requirements for the purposes preventing such acts or practices. The Committee intends that under these provisions the NCUA will promulgate a rule substantially similar to the FTC's Credit Practices Rule (16 C.F.R. 444, effective March 1, 1985) within 6 months from the effective date of this act, unless it finds that such acts or practices by Federal credit unions are not unfair or deceptive and publishes such findings in the *Federal Register.*

The Committee intends that NCUA be authorized to use its full authority under the Federal Credit Union Act to remedy suspected antitrust and consumer protection violations by Federal credit unions. Section 120 of the Federal Credit Union Act (12 U.S.C. 1766) provides NCUA general rulemaking power, including the

power through rulemaking to govern mergers among Federal credit unions. Section 206 (12 U.S.C. 1786) provides NCUA the power to issue cease and desist orders where, inter alia, a credit union is engaged in an "unsafe or unsound practice" or is violating or is about to violate a "law, rule, or regulation."

NCUA would have ample authority under section 120 and under the amendments made by this section to promulgate rules respecting unfair or deceptive acts or practices pursuant to section 18(f) of the FTC Act. As the amendments made by this section made clear, the penalty provisions of sections 120 and 206 of the Federal Credit Union Act would apply fully to violations of such rules. In addition, the Committee believes that NCUA would also have the authority under section 120 to order credit unions to cease from otherwise violating the FTC Act or any other antitrust of consumer protection "law, rule or regulation." [26]

In writing in support of the section, NCUA Chairman E.F. Callahan confirmed that:

> The NCUA is prepared to ensure proper compliance in such matters, and we concur that our authority under section 120 . . . and section 206 . . . is sufficient to protect the interests of Federal credit union members. [27]

In addition, the Committee notes that the U.S. Department of Justice would retain antitrust authority over credit unions, just as it has over banks and savings and loan institutions.

SECTION 12.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to provide that the Commission shall have no authority under that section to initiate any new rulemaking proceedings which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

Under this section, the Commission would continue to have the authority to rely on unfairness to prohibit or regulate commercial advertising in individual case adjudications under section 5 of the FTC Act. The Commission would also continue to have the authority to prohibit or regulate commercial advertising based upon a deception theory, through both section 5 case adjudications and section 18 rulemakings. This section would thus make permanent the similar limitation on new section 18 rulemakings enacted on a temporary basis in section 11 of the FTC Improvement Act of 1980.

For purposes of this section, the term "commercial advertising" denotes promotional messages that appear in broadcast or print media, including promotional mailings. It is not intended to cover oral representations, representations in credit contracts, debt col-

---

[26] *CF., Reich* v. *Webb*, 336 F.2d 153 (9th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965); *Otero Savings and Loan Assoc.* v. *Federal Home Loan Bank Board*, 665 F.2d 279 (10th Cir. 1981).

[27] April 26, 1985 letter from NCUA to Senator Kasten. This letter is printed in the record of the Consumer Subcommittee's April 24, 1985 hearing.

lection notices, and the like, which would remain subject to the Commission's unfairness jurisdiction. [28]

Further, this section is intended to apply to regulation by the Commission of the content of commercial advertising, and not to regulation of practices that may somehow pertain to such advertising but are not themselves advertising. For example, this section would not affect the Commission's authority to regulate practices that ban or restrain commercial advertising, or to regulate "practices" that are unfair; e.g., placing sample razor blades in a newspaper insert.

The Committee believes that the limitation contained in this section is warranted because the constitutional protection accorded to non-deceptive commercial speech is threatened by the broad grant of "unfairness" jurisdiction contained in section 18 of the FTC Act. The fact that "purely" commercial speech is within the protection of the First Amendment is no longer subject to doubt. [29] In recent Supreme Court decisions defining the limits of governmental power to regulate commercial speech, the Court has made it clear that government retains the power to proscribe misleading or deceptive advertising.

The "unfairness" standard in section 18 has no proper place in the regulation of commercial speech as the standard is too vague to avoid an unacceptable risk of abridging First Amendment principles of free speech, and does not take into account the mandate that the least restrictive form of regulation must be used consistent with meeting the substantial governmental interest involved.[30] The Committee is particularly concerned that the use of unfairness authority when applied on an industry-wide basis in rulemaking proceedings is too broad. By contrast, when the Commission proceeds using its section 5 adjudicative authority, the Commission's remedial order may be better tailored to the facts of the specific case before the Commission. Moreover, the Commission's use of the unfairness standard has survived litigation in cases dealing with unfair methods of competition or unfair acts of practices, not advertising.[31] Because the unfairness standard in section 18 goes beyond the elimination of misleading or deceptive commercial speech, it raises an unacceptable potential for conflict with First Amendment principles.

Moreover, the Committee is persuaded that the FTC's existing authority to prohibit unfair or deceptive acts or practices under section 5 and deceptive practices under section 18 is sufficient to permit the Commission to police abusive advertising practices. The Committee believes that illegal advertising practices prohibited by the Commission in the past could be reached by this authority. Consequently, the Committee believes this amendment does not in any way undercut appropriate Commission law enforcement but

---

[28] *See, e.g., Horizon Corp.* (Dkt. No. 9017, May 15, 1981); *Spiegel, Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976); *General Motors Corp.*, 95 F.T.C. 825 (1980).

[29] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S., 748, 762 (1976).

[30] *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

[31] *See e.g., FTC* v. *R. F. Keppel & Bros.*, 291 U.S. 304 (1934); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

only protects against unwarranted and constitutionally sensitive actions against commercial advertising in the future.

While it appears that the Commission has, in the past, attacked certain abusive advertising practices as "unfair," it has also attacked these same practices as "deceptive," and this section should, therfore, not result in legalization of such practices in the future. One example is the Commission's advertising substantiation program. Unsubstantiated advertising was originally addressed as an "unfair" practice,[32] but subsequent Commission decisions have firmly established that dissemination of unsubstantial advertisements is a deceptive practice, as well.[33] Recently, the Commission has clarified the "deception" basis for its ad substantiation doctrine in its Ad Substantiation Policy Statement.[34]

It should be noted that in advocating enactment of related legislation in testimony before the Committee, representatives of the major advertising trade associations said that they did not intend "to affect in any way the FTC's power to require that positive claims made in advertisements must be substantiated." This section is not intended to impair in any way the Commission's advertising substantiation program.[35]

A second example relates to commercial advertising depicting unsafe or unlawful activity.[36] While such cases have been addressed in the past as both "unfair" and "deceptive" practices, representatives of the advertising industry testified that they "could clearly be brought under a deception theory." The Committee believes that, to the extent such advertisements are deceptive because they fail to reveal material facts, the advertisements may be deceptive.

SECTION 13.—REPORT

This section requires the Commission to submit a detailed report, twice a year during fiscal years 1986, 1987 and 1988, on its enforcement of the law against resale price maintenance.

Since 1911, resale price maintenance—the fixing of retail prices by manufacturers—has been deemed by the courts to be a per se violation of the antitrust laws. Congress affirmed this view when it repealed authorization for State Fair Trade laws in 1975, and expressed its intent to reapply the per se rule across the country.

---

[32] *See, e.g., Pfizer, Inc.*, 81 F.T.C. 23 (1972).

[33] *Eg., National Comm'm on Egg Nutrition*, 88 FTC 89, 191 (1976), aff'd, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Sears, Roebuck & Co.*, 95 FTC 406, 520-21 (1980), aff'd, 676 F.2d 385 (9th Cir. 1982).

[34] 49 Fed. Reg. 309-399 (Aug. 7, 1984).

[35] In approving the ad substantiation program the Committee intends to incorporate the general scope of this program as it has been endorsed by the Commission and the courts. We recognize that its application may require further elaboration by the Commission and the courts. The Committee has not reviewed, and takes no position on the FTC staff position in various FTC ad substantiation cases which are currently pending.

[36] *See e.g., Uncle Ben's Inc.*, 89 FTC 131 (1977) (ad portrayed children cooking at a stove); *Mego Industries, Inc.*, 92 FTC 186 (1978) (ad portrayed child using electric appliance near sink of water); *General Foods Corp.*, 86 FTC 831 (1975) (ad portrayed Euell Gibbons eating wild plants in ad for Grape-Nut cereal); *AMF, Inc.*, 95 FTC 310 (1980) (ad showed children riding bicycles in unsafe manner). The cases were consent settlements and were never litigated. Cases in which advertisements depict usage of a product in an unsafe or inappropriate manner have occurred infrequently in the past, and this is an area in which the Committee hopes that there will be continued cooperation between the Commission and industry.

Notwithstanding this clear history of the law, some members of the Commission have expressed their disapproval of the per se rule. As the Committee learned in the course of its hearings, this view has been reflected in a reduction in the Commission's law enforcement activity in this area.

The Committee is concerned about the lack of law enforcement in this area. The current prohibition of resale price maintenance is intended to protect both consumers—who seek low retail prices—and retailers, who seek the right to compete. In exercise of its oversight powers, the Committee consequently has mandated that the Commission forward detailed information about its activities in this area. Such information may serve as a basis for other appropriate legislative action.

SECTION 14.—AUTHORIZATION OF APPROPRIATIONS

This section would provide for a 3-year reauthorization of the Commission at the following funding levels: $65,800,000 for fiscal year 1986; $66,800,000 for fiscal year 1987; and $67,800,000 for fiscal year 1988. For fiscal years 1987 and 1988, such additional sums also are authorized as may be necessary for increases in salary, pay, and other employee benefits as authorized by law.

SECTION 15.—BUILDING CONSOLIDATION

This section authorizes a total appropriation of $3,811,000 during fiscal years 1986, 1987, and 1988, to carry out the consolidation into not more than three buildings of the Headquarters Offices of the Commission in Washington, DC. At present, the Commission has five "satellite offices" in the Washington, DC area, and it is anticipated that this consolidation will result in substantial savings.

SECTION 16.—EFFECTIVE DATE

This section states that, unless otherwise provided, provisions of this legislation become effective on the date of enactment. The amendments made by sections 2 and 7 of this legislation, which pertain to the Commission's "unfair methods of competition" authority and the effective date of cease-and-desist orders, apply only with respect to cease-and-desist orders issued under section 5 of the FTC Act (15 U.S.C. 45) after the date of enactment. Section 9 of this legislation, which defines "unfair acts or practices", applies only with respect to cease-and-desist orders issued under section 5 of the FTC Act (15 U.S.C. 45), or to rules promulgated under section 18 of the FTC Act (15 U.S.C. 57a), after the date of enactment.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

THE FEDERAL TRADE COMMISSION ACT

Section 5 of that Act

SEC. 5. (a)(1) * * *

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act from using unfair methods of ocmpetition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) * * *

(b)-(f) * * *

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

[(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or]

(2) Upon the sixtieth day after such order is served, if a petition for review has been duly filed, except that any such order may be stayed, in whole or in art and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the thirty-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending; or

[(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or]

(3) For purposes of section 19(a)(2) and section 5(m)(1)(B), if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed; or

[(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.]

(4) In the case of an order requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court directing the order of the Commission be affirmed or the petition for review be dismissed.

(h)–(1) * * *

(m)(1)(A) * * *

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues, a final cease and desist order, *other than a consent order,* with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) * * *

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. *Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).*

(3) * * *

(n) The Commission shall not have any authority to find a method of competition to be an unfair method of competition under subsection (a)(1) if, in any action under the Sherman Act, such methods of competition would be held to constitute State action.

(o) The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighted by countervailing benefits to consumers or to competition.

Section 6 of that Act

SEC. 6. The commission shall also have power—

(a) To gather and compile information concerning and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* and common carriers subject to the act to regulate commerce, and its relation to other persons, partnerships, and corporations.

To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports, or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c)–(h) * * * *Provided,* That the exception of "banks, savings and loan institutions described in section 18(f)(3), *Federal credit unions described in section 18(f)(4),* and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information to investigate or to require reports or answers from, any person, partnership or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking, in business as a savings and loan institution, *in business as a Federal credit*

union, or in business as a common carrier subject to the Act to regulate commerce.

* * * * * **

Section 18 of that Act

SEC. 18. (a)(1) Except as provided in [subsection (i)] *subsection (h)*, the Commission may prescribe—

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) * * *

(b) (1)–(2) * * *

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if it has issued cease and desist orders regarding such acts or practices, or any other information available to the Commission indicates a pattern of unfair or deceptive acts or practices.

(c)–(e) * * *

(f) (1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks, or savings and loan institutions described in paragraph (3) each agency specified in paragraph (2) or (3) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks or savings and loan institutions described in paragraph (3) subject to its jurisdiction. The Board of Governors of the Federal Reserve System (with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3)) *and the National Credit Union Administration Board (with respect to Federal credit unions described in paragraph (4))* shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule takes effect each such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions described in paragraph (3), *or Federal credit unions described in paragraph (4)*, as the case may be, which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless (A) [either such] *any such*

Board finds that such acts or practices of banks or savings and loan institutions described in paragraph (3), *or Federal credit unions described in paragraph (4),* as the case may be, are not unfair or deceptive, or (B) the Board of Governors of the Federal Reserve System finds that implementation of similar regulations with respect to banks, *savings and loan institutions or Federal credit unions* would seriously conflict with essential monetary and payments systems policies of such Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

(2)–(3) * * *

(4) Compliance with regulations prescribed under this subsection shall be enforced with respect to Federal credit unions under sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1766 and 1786).

[(4)] *(5)* For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regulation prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

[(5)] *(6)* The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

[(6)] *(7)* Each agency exercising authority under this subsection shall transmit to the Congress each year a detailed report on its activities under this paragraph during the preceding calendar year.

(g) * * *

[(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

[(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserved amount shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserved amount whichis not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

[(3) The aggregate amount of compenssation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000.

[(4) The commission, in connection with the administration of this subsection pursuant to rules prescribed by the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

[(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and

[(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation under such program.]

[i]*(h)* The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce. *The Commission shall have no authority under this section to initiate any new rulemaking proceeding which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.*

[(j)]*(i)* (1) For purposaes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commission to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

[(k)]*(j)* Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any op-

erating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

Section 20 of that Act

Sec. 20. (a) For purposes of this section:

(1) The terms "civil investigative demand" and "demand" mean any demand issued by the Commission under subsection (c)(1).

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(3) The term "Commission investigator" means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *acts or practices or methods of competition declared unlawful by a law administered by the Commission.*

(4)–(6) * * *

(7) The term "violation" means any act or omission constituting an [unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(b) For the purpose of investigations performed pursuant to this section with respect to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission,* all actions of the Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *any act or practice or method of competition declared unlawful by a law administered by the Commission, the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be servedupon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning documentary material or other informa-*

tion, or to furnish any combination of such material, answers, or testimony.

(2)–(12) * * *

(d)–(j) * * *

Section 23 of that Act

SEC. 23. * * *

SEC. 24. (a) For purposes of this section, the term "Capper-Volstead Act" Means the Act entitled" An Act to authorize association of producers of agricultural products," approved February 18, 1922 (7 U.S.C. 291 et seq.).

(b) The Commission shall not have any authority to conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Capper-Volstead Act, is not a violation of any of the antitrust Acts or this Act.

(c)(1) Before issuing a complaint under section 5 against any agricultural cooperative on the basis that such cooperative has violated any of the antitrust Acts or has used an unfair method of competition in or affecting commerce, the Commission shall—

(A) provide the Secretary of Agriculture with a copy of the proposed complaint not less than fifteen days before the complaint is issued; and

(B) consult with the Secretary of Agriculture regarding the possible applicability of the Capper-Volstead Act to the conduct of the cooperative.

(2) The Commission shall not issue any such complaint unless—

(A) it has considered any comments regarding such complaint which have been submitted by the Secretary of Agriculture under this subsection; and

(B) it has reason to believe that the Capper-Volstead Act does not provide an exemption for the conduct which is the basis of such complaint.

(3) If the Commission makes a modification to any such complaint after it has provided the Secretary of Agriculture with a copy of the complaint pursuant to (1)(A) of this subsection, the Commission shall not, with respect to such modification, be required to comply with the provisions of paragraphs (1) and (2) of this subsection unless such modification substantially expands the original basis for the issuance of the complaint.

(4) The Secretary of Agriculture shall designate those officials and employees of the Department of Agriculture who may have access to documents or information received from the Commission under this subsection. Officials and employees of the Department of Agriculture shall be subject to the same requirements and penalties regarding confidentiality of such documents and information and disclosure of the existence of an investigation or consideration of a complaint as apply to officials and employees of the Commission.

(5) Unless specifically authorized in writing by the Commission (or by any official or employee of the Commission designated by the Commission), no official or employee of the Department of Agriculture may request information relating to such complaint from any proposed respondent or any third party before the issuance of such complaint.

(6) After any such complaint is issued, the Secretary of Agriculture may file with the Commission a written statement regarding the applicability of the Capper-Volstead Act to the action or method which is the basis of such complaint. The Commission shall include such statement in the record of the proceeding regarding such complaint.

(7) No decision of the Commission to consult with the Secretary of Agriculture in accordance with the provisions of this subsection shall be construed to imply that the Commission has made a determination that it has reason to believe that any agricultural cooperative has violated or is violating any of the antitrust Acts or has used an unfair method of competition in or affecting commerce.

(8) The provisions of this subsection shall not create any new basis for direct or collateral challenge to any complaint issued by the Commission.

(d) The Commission shall not have any authority to conduct any study or investigation of any agricultural marketing orders.

SEC. 25. The Commission shall not have any authority to take any action under section 14 of the Act entitled 'An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes' (15 U.S.C. 1064), commonly referred to as the Lanham Act, with respect to the cancellation of the registration of any mark on the ground that such mark has become the common descriptive name of an article or substance.

Section 24 of that Act

SEC. [24] *26.* There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $42,000,000 for the fiscal year ending June 30, 1975; not to exceed $47,091,000 for the fiscal year ending June 30, 1976; not to exceed $50,000,000 for the fiscal year ending in 1977; not to exceed $70,000,000 for the fiscal year ending September 30, 1980; not to exceed $75,000,000 for the fiscal year ending September 30, 1981; [and] not to exceed $80,000,000 for the fiscal year ending September 30, 1982*; not to exceed $65,800,000 for the fiscal year ending September 30, 1986; not to exceed $66,800,000 for the fiscal year ending September 30, 1987; and not to exceed $67,800,000 for the fiscal year ending September 30, 1988, and such additional sums for the fiscal years ending September 30, 1987 and September 30, 1988, as may be necessary for increases in salary, pay, and other employee benefits as authorized by law. In addition, there is authorized to be appropriated during the fiscal years ending September 30, 1986, September 30, 1987, and September 30, 1988, a total amount not to exceed $3,811,000, to carry out the consolidation into not more than three buildings of the Headquarters Offices of the Commission in Washington, District of Columbia.*

Section 25 of that Act

SEC. [25] *27.* This Act may be cited as the "Federal Trade Commission Act".

ADDITIONAL VIEWS OF MESSRS. GORTON AND PACKWOOD

After years of controversy, the Committee has reached consensus on legislation to reauthorize the FTC, S. 1078.

While we cosponsored S. 1078, the FTC Act Amendments of 1985, and urge approval by the full Senate, we believe two points related to section 2 of this bill and section 2 of S. 1714 (98th Congress) deserve special emphasis. These two points are:

1. The scope of the "State action" doctrine as used in S. 1078; and

2. The exclusion of language from S. 1078 limiting the FTC's consumer protection authority.

Both of these points should have been more extensively addressed in S. 1078 and its accompanying report. Our analysis elaborates on but does not dispute the Committee's intent with respect to these two points.

1. STATE ACTION DOCTRINE

Section 2 of S. 1078 would amend section 5 of the FTC Act to add a new subsection providing that the Commission shall not have any authority to find a method of competition to be an unfair method of competition if, in any action under the Sherman Act, such method of competition would be held to constitute "State action." Beginning with the Supreme Court's 1943 decision in *Parker* v. *Brown*,[1] the Court has held that the actions of a State itself, as sovereign, are exempt from the Sherman Act. Where a restraint is imposed by some party other than the State legislature or supreme court, the Court has held that such challenged restraint is exempt from antitrust challenge under the Sherman Act only if, first, such restraint is clearly articulated and affirmatively expressed as State policy to displace competition and, second, the State actively supervises such restraint.[2] These two requirements for "State action immunity were most recently clarified by the Supreme Court in *Southern Motor Carriers Rate Conference* v. *United States*,[3] and *Town of Hallie* v. *City of Eau Claire*.[4]

Section 2 of S. 1078 makes this judicially developed "State action" immunity applicable to the Commission's "unfair methods of competition" authority only, to the same extent such authority is applicable in actions under the Sherman Act. Section 2 is not in-

---

[1] 317 U.S. 341 (1943).

[2] See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); see also *Town of Hallie* v. *City of Eau Claire*, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference* v. *United States*, 105 S. Ct. 1721 (1985); *Hoover* v. *Ronwin*, 104 S. Ct. 1989 (1984); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 384 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

[3] 105 S. Ct. 1721 (1985).

[4] 105 S. Ct. 1713 (1985).

tended to apply the "State action" doctrine to the FTC's "unfair or deceptive acts or practices authority."[5]

2. PTC CONSUMER PROTECTION ACTIVITIES

Perhaps no issue has presented a greater impediment to the reauthorization of the FTC than that of the proper scope of the Commission's authority to regulate the activities of professionals pursuant to its consumer protection authority. In the 97th Congress, attempts to fully exempt professionals from the Commission's jurisdiction were summarily rejected by the Senate. In the 98th Congress, the Committee approved language limiting the Commission's authority to preempt State law regarding education, experience, and training requirements for professionals, and the permissible tasks and duties professionals may perform based on education and training.

The Committee has correctly concluded this year that no restrictions need to be placed on the Commission's authority over professionals. Allegations that the Commission would interfere with the activities of professionals have proven untrue. Rather, the commercial character of many aspects of professional conduct is now widely recognized, and it is this area—the business and commercial practices of professionals—that the FTC has addressed through its enforcement actions.

Regrettably, unwarranted restrictions on competition among professionals have been implemented in the past by some State laws or regulations. For instance, during hearings held last session,[6] the Committee heard examples of State laws prohibiting truthful advertising by members of a profession. The Committee also heard of some State laws or regulations affecting more than one profession which authorized or prohibited professional tasks or duties but which were not based on the specialized training or education received by members of all the affected professions. As a result, although receiving similar training for certain tasks or duties some professions were permitted to perform these tasks or duties while others were not. S. 1078 will permit the Commission to address such unwarranted restrictions on competition among professionals.

We are confident that the Commission will continue to exercise fairly its jurisdiction in this area, thereby prohibiting unfair or deceptive acts or practices and private anticompetitive conduct while reserving to the States their legitimate regulatory prerogatives over those acts and practices of professionals which are not of a business or commercial nature.

SLADE GORTON.
BOB PACKWOOD.

○

---

[5] It should also be noted that no court has held that the "State action" doctrine is applicable to the FTC's "unfair or deceptive acts or practices" authority.

[6] Federal Trade Commission Authorization: Hearings Before the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 1st sess. (1983). Serial No. 98–19.